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No. _____

In the

Supreme Court of the United States

October Term, 1982

Alan K. Stuart, *Petitioner*

V.

United States of America, *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

On appeal to the Eighth Circuit Court of Appeals, the petitioner argued that records obtained for third party banks through an administrative summons procedure, should not have been received in evidence. The Eighth Circuit Court of Appeals declined to consider this question on its merits, holding that it could have been argued in a civil summons enforcement proceeding, in which petitioner had intervened, and that the issue was, therefore, res judicata.

1. The principal question presented for review is whether a civil determination of a fact question can be res judicata in a subsequent criminal case, which ultimately would determine whether or not the Court of Appeals should have considered the petitioner's argument on its merits.

2. A secondary question presented to this Court is whether or not the Internal Revenue Service abused its summons authority by issuing administrative summonses for the purpose of aiding a criminal prosecution, or for the purpose of gathering information to be used by another agency, the Department of Justice.

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PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Alan K. Stuart, the petitioner herein, prays, that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals entered in the above-entitled case on September 22, 1982, and on October 15, 1982.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 689 F.2d 759 (1982), and is printed in the Appendix hereto, infra, page A-1. The U.S. District Court, Eastern District of Arkansas, rendered an unreported oral opinion which is reproduced in the Appendix hereto, infra, page A-7. The opinion of the Eighth Circuit Court of Appeals in a related prior civil matter is reported at 587 F.2d 929, and is printed in the Appendix hereto, infra, page A-9. The Judgment and Commitment Order of the District Court is printed in the Appendix hereto, infra, page A-12. The Order of the Eighth Circuit Court of Appeals, denying rehearing, is also printed in the Appendix, infra, page A-13.

JURISDICTION

The Judgment of the Court of Appeals was entered September 22, 1982. On October 15, 1982, the Court of Appeals entered an order denying petitioner's petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petitioner in this case was convicted of the offense defined in 26 U.S.C. §7203, which provides as follows:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

This case involves 26 U.S.C. §7602, which provides as follows:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liabiity, the Secretary is authorized—
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
> (3) To take such testimony of the person concerned under oath, as may be relevant or material to such inquiry.

STATEMENT OF THE CASE

This case arises from a judgment convicting Alan K. Stuart of three counts of willful failure to file income tax returns. The information was filed June 22, 1981. On July 1, 1981, a warrant for Stuart's arrest was issued and executed upon the affidavit of Charles Huckabee, a special agent of the Internal Revenue Service.

At the trial the defendant objected to the introduction into evidence of bank records, because the records were obtained in bad faith by the Internal Revenue Service through an unauthorized administrative summons. The defendant's argument was that the Service is not authorized by Congress to use this process to obtain information for a criminal prosecution.

The government's principal exhibit used to establish the filing requirement was Government Exhibit 77, a computation of "gross income" for the three years in question. The bank records obtained through the issuance of administrative summonses formed the basis for this computation.

Mr. Huckabee testified that in 1977, he was referred a 1976 Form 1040 "protest document" apparently submitted by the defendant, Stuart. The Internal Revenue Service has a specified procedure to follow in the event a "protest document" is received by the Internal Revenue Service Center. In fact, the Service had, in 1977, a Tax Protest Program to deal with this type of document. Immediately upon receipt of such a document, the Service Center, following the procedure outlined in its Tax Protest program, forwards the document to the appropriate district for evaluation by its Criminal Investigation Division.

In Stuart's case, Mr. Huckabee next determined that Stuart was a well driller, and before he contacted Mr. Stuart on December 1, 1922, "a decision was then made" to

begin a criminal investigation. When Stuart was first contacted, a rights form was read to him, similar to a *Miranda* warning. Although Mr. Huckabee testified that an auditor was assigned to the case on December 14, 1977, the auditor had no contact with the administrative summons and did not do anything of substance with respect to the investigation. Another agent was substituted later. Mr. Huckabee explained that the first agent was from the Jonesboro office, and after the records were obtained, it would be more convenient to have a revenue agent in Little Rock to assist.

The Internal Revenue Service did not use the information obtained through the summonses to prepare a return.

On November 24, 1981, a final judgment and commitment was entered by Honorable William R. Overton, United States District Judge in and for the Eastern District of Arkansas, Western Division, in Case No. LR-CR-81-47. The District Court assumed jurisdiction of the case under 18 U.S.C. §3231.

The notice of appeal was filed in the office of the United States District Clerk, Little Rock, Arkansas, on December 3, 1981, nine days after the date of sentencing.

The Court of Appeals had jurisdiction of the appeal under 28 U.S.C. §1291.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS IN PRINCIPLE AMONG THE LOWER COURTS.

The specific question presented for review in the Court of Appeals was whether or not the district court erred in admitting into evidence certain documents obtained through the use of IRS summonses. The petitioner contended at the trial, and on appeal, that the summons process was not utilized for one of the valid civil purposes enumerated in 26 USC §7602, but for the purpose of aiding a criminal investigation. At the trial and on appeal, the petitioner attempted to attack the summonses on the ground that they were not issued in good faith prior to an institutional decision to prosecute.

This court has attempted to resolve the issue before, in *United States v. LaSalle National Bank*, 437 U.S. 298 (1978). Nevertheless, the lower courts have been unable to resolve the question of what facts tend to establish "good faith", and which facts establish "bad faith" in the cases which have been reported subsequent to the *LaSalle* decision.

26 U.S.C. §7602 lists the purposes for which Congress conferred the summons authority on the I.R.S. "For the purpose of ascertaining the correctness of any return, making a return where none has been made . . . .", and for other related purposes, the Internal Revenue Service is permitted to issue a summons, on its own authority, to third persons, such as banks, to obtain records of taxpayers' transactions.

Before the enactment of 26 U.S.C. §7602, and its predecessors, the Internal Revenue Service absolutely did not have the authority to issue a subpoena or "summons" to

obtain the records of a taxpayer from third parties without a court order. It is therefore reasonable to assume that the only authority it now has in that regard is the authority granted to it by Congress.

This principal was ably expressed by Justice Blackman, writing for the majority in *United States v. LaSalle National Bank*, 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978) "The Service does not enjoy inherent authority to summon production of the private papers of citizens. It may exercise only that authority granted by Congress . . . Congress . . . intended the summons authority to be used to aid the determination and collection of taxes. These purposes do not include the goal of filing criminal charges against citizens."

The court discussed in depth the implications of such a misuse of the summons authority in a case where the "sole" purpose of the investigation was to uncover criminal activity, and stated that " . . . the question whether an investigation has solely criminal purposes must be answered only by an examination of the institutional posture of the IRS."

The conflicts in the decisions of lower courts on similar issues to seem to stem from the fact that in the *LaSalle* case this court, by way of explanation, considered the unlikely possibility that an investigation by the Internal Revenue Service in which records were summonsed from third parties might be for "solely criminal purposes", and have no civil consequences. Unfortunately, nearly all investigations of this type are likely to produce evidence of liability or non-liability for unpaid taxes, civil penalties, and/or interest. Indeed, this court pointed out in the *LaSalle* opinion, that "the institutional responsibility of the Service to calculate and to collect civil fraud penalties and fraudulently reported or unreported taxes is not necessarily overturned by a single agent who attempts to build a criminal case." The court pointed out that the issue is the institutional

purpose for the investigation. This language has apparently led many, but not all, of the lower courts to adopt the theory that institutional good faith is shown if there is any possibility that a criminal investigation may later prove useful in calculating the amount of any taxes which should be assessed.

However, this court went on to say that it would "not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution. Such a delay would be tantamount to the use of the summons authority after the recommendation and would permit the Government to expand its criminal discovery rights." Therefore, the question of whether such a summons may be issued before a recommendation to the Justice Department is left open, and has been subject to various tests in the lower court.

Analyzing *LaSalle*, a California District Court observed in *U.S. v. Dahlstrum*, 493 F. Supp. 966 (1980), that the nature of the inquiry after criminal proceedings have begun is quite different from the inquiry in a summons enforcement proceeding. In the criminal action, the court has the benefit of hindsight in analyzing the purposes for the issuance of the summons. And while several cases have indicated that the test may be whether a recommendation of prosecution had already been made at the time the summons was issued, *Dahlstrum* actually presented a situation where the recommendation came long after the summons.

The facts existing in the *Dahlstrum* case are similar in many respects to the facts which exist in the present case. In *Dahlstrum*, the investigation began May 17, 1976, when a revenue officer in the Collection Division referred the case to the Intelligence Division. On February 3, 1977, a special agent issued a civil summons pursuant to 26 U.S.C. §7602,

with the approval of his group manager. On May 2[illegible], 1977, another revenue officer was assigned to assist the special agent. A joint report was filed by special agent and the revenue officer on January 3, 1982, recommending a criminal prosecution referral and civil fraud penalties. By way of comparison to this case, the investigation of Mr. Stuart began with the receipt by the Internal Revenue Service of a form 1040A "protest document", which was immediately referred to the Criminal Investigation Division pursuant to an established set of procedure in effect at that time within the Service. The special agent was assigned to Mr. Stuart's case, after which a revenue agent was assigned to the case; but the revenue agent had nothing to do with the investigation until the investigation was complete, after which time another revenue agent was assigned to assist the special agent. The revenue agent's report was filed almost simultaneously with the special agent's report, which recommended referral to the Department of Justice.

In the *Dahlstrum* case, the Service had claimed that it was conducting a "joint" investigation, in which its Criminal Investigation Division and its Audit Division were working as a team. The court rejected this contention, and in fact relied heavily on the procedures outlined in the Internal Revenue Manual, spelling out at great length, the need for close cooperation between the special agent and the revenue agent in a joint investigation. The revenue agent had not really had any particular duties to perform in the investigation. Only the special agent did.

It has been further held that the existance of a civil purpose for the investigation as a whole does not render a summons lawful if the purpose of the summons itself is to gather information for solely criminal purposes. Otherwise, the taxpayer would have an impossible burden of proof in trying to establish that there would be no civil tax consequences of an Internal Revenue investigation. *United States v. Genser*, 595 F.2d 146 (3rd Cir. 1979), cert. den., 444 U.S. 928, 100 S.Ct. 269, 62 L.Ed.2d 185 (1979).

In the present case, the government relied on *U.S. v. Schutterle*, 586 F.2d 1201 (8th Cir. 1978), which indicates that in order to show an abuse of the summons procedure, it must be shown by the defendant that there had been an actual, official abandonment of civil tax determination. It is submitted that this situation is so unlikely that in the Eighth Circuit, the guidelines set forth by the Supreme Court in the *LaSalle* case are, for all practical purposes, nullified by the *Schutterle* case.

The *Dahlstrum* case was not followed in *United States v. Barksdale*, 499 F. Supp. 624. There was also an apparent departure from *LaSalle*, *Genser*, and *Dahlstrum*, in *U.S. v. Stuckey*, 646 F.2D 1369 (3rd Cir., 1981), which was a civil summons enforcement proceeding. However, a distinction should be made between a summons enforcement proceeding and a criminal prosecution.

In summary, some of the lower courts apply the *LaSalle* theory liberally, in favor of defendants, while others limit its application in every case and without exception, pointing out that any criminal investigation could conceivably result in the assessment of taxes. These conflicts should be resolved by this Court in order to establish a uniform approach to the use of administrative summonses by agencies, such as the Internal Revenue Service, exercising powers delegated to them by Congress.

II.

THE COURT OF APPEALS ERRONEOUSLY REFUSED TO CONSIDER PETITIONER'S CHALLENGE TO THE ADMISSION OF EVIDENCE OBTAINED THROUGH ADMINISTRATIVE SUMMONSES, BY HOLDING THAT A JUDGMENT IN A CIVIL ACTION IS RES JUDICATA IN THE PRESENT CRIMINAL ACTION.

In its opinion, the Court of Appeals noted that Mr. Stuart previously challenged the IRS summonses. After

Mr. Huckabee, a special agent of the Internal Revenue Service, on March 10, 1978, filed petitions to enforce the summonses, Mr. Stuart intervened to oppose judicial enforcement, as permitted by 26 U.S.C. §7609 (b).

Mr. Stuart appealed from an adverse ruling by the district court in that case, arguing that the summonses had issued improperly without a showing of tax liability, and that they violated his Fifth and Fourth Amendment rights. *United States v. Stuart*, 587 F.2d 929.

Mr. Stuart did not argue at that time that the summonses were being issued to aid a criminal prosecution. In fact, the opinion of the Court of Appeals in that case was that it would affirm the action of the district court precisely because Stuart did not raise these questions.

In considering the defendant's contentions on appeal in the present case, the Court of Appeals noted that Mr. Stuart had previously challenged the IRS summonses, and that he had not in that previous litigation raised the issue of institutional bad faith in issuing the summonses for the purpose of aiding a criminal investigation. The Court's opinion further states that the principal of res judicata bars relitigation of the same claim even where a new theory is advanced as a basis for relief.

The petitioner respectfully submits that certiorari should be granted, and that his arguments relating to the admissibility of bank records (including the "fruits" of bank records) should be considered on their merits, for the following reasons:

1. At the time of the previous civil litigation, wherein Mr. Stuart intervened in a summons enforcement procedure, the fact that the summonses had been issued for an unauthorized purpose (such as aiding the enforcement of criminal tax laws, aiding a criminal investigation, determining whether or not to recommend prosecution, or

gathering information for the use of another agency, the Department of Justice) was not apparent. At that time, it was impossible for Mr. Stuart to determine whether or not a recommendation for prosecution had been or would be made, and there was certainly no way to prove the purposes for that summons, or the intentions of the IRS agents. By contrast, after the filing of the information, and after the liberal discovery permitted in criminal proceedings could be accomplished, Mr. Stuart could be and was better informed as to what institutional decisions were being made at the time of the issuance of the summonses. *United States v. Genser*, 595 F.2d 146 (3rd Cir. 1979), cert. den., 444 U.S., 928, 100 S.Ct. 269, 62 L.Ed.2d 185 (1979).

2. Issues before the court in a criminal proceeding are entirely different from the issues which are before the court in a civil proceeding. Generally, a judgment of a civil court is not binding upon a court in which a criminal case is being tried, and a judgment rendered in a civil action is not admissible in a subsequent criminal prosecution where the judgment is offered for the purpose of proving facts adjudicated thereby, although exactly the same questions are in dispute in both cases. This doctrine has been held applicable even in cases where the state and the criminal defendant were parties in the civil action. 46 Am.Jur.2d, Judgments, §620; *Helvering v. Mitchell*, 303 U.S. 391, 397; 58 S.Ct. 630; 82 L.Ed. 917 (1938); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 54, 8 et seq., 63 S.Ct. 379, 87 L.Ed. 443 (1943); *State of Idaho v. Johnson*, 536 P.2d 295; *Dranow v. United States*, 307 F.2d 545.

3. In a criminal case, different rules as to the weight of evidence, or quantum of proof necessary, prevail.

4. The questions presented by both of Mr. Stuart's challenges to the IRS summonses are similar in several respects to the issues raised in determining questions of search and seizure. In a third party summons enforcement

proceeding, where a taxpayer has intervened to stay enforcement, the action is essentially a civil action. However, search and seizure questions arising under the Fourth Amendment, can be litigated in a civil action for the damages. The issue may then be relitigated in a criminal proceeding if the evidence obtained through the search and seizure is offered as evidence against the accused. It has been held that a different standard of proof is required in a suppression hearing than would be applied in a civil action for damages arising from an illegal search. 68 Am.Jur.2d, Searches and Seizures, §120.

The issue of whether or not a judgment, decree, order, or evidentiary ruling made by a court in a civil action is conclusive on the same court or another court in a subsequent criminal action, is of vital importance, and extends far beyond the concerns of this particular defendant in this particular case. The holding of the Court of Appeals on this question is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's certiorari jurisdiction.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 81-2348

United States of America,

Appellee,

v.

Alan K. Stuart,

Appellant.

Appeal from the United States District Court for the Eastern District of Arkansas

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Submitted: July 14, 1982
Filed: September 22, 1982

Before LAY, Chief Judge, HEANEY and McMILLIAN, Circuit Judges.

LAY, Chief Judge.

Alan K. Stuart was convicted in a jury trial on three counts of willful failure to file income tax returns for the years 1974, 1975 and 1976 in violation of 26 U.S.C. §7203 (1976). He was fined $5,000 and was sentenced to one year imprisonment on the first count. On the second count he received a suspended sentence and one year of probation consecutive to incarceration, and on count three a suspended sentence and one year of probation to run consecutive to the year of probation imposed on count two.

On this direct appeal he contends (1) that the district court erred in admitting into evidence material obtained pursuant to IRS summonses; (2) that he was entitled to an evidentiary hearing on his contention that he was the victim of selective prosecution; (3) that he was entitled to dismissal under the Speedy Trial Act of 1974; (4) that the district court erred in sentencing him for three violations instead of one; and (5) that the district court lacked subject matter jurisdiction as to the charge involving 1974, and lacked probable cause and personal jurisdiction as to all counts. We affirm.

The charges in this case had their inception in a form 1040 "protest document" submitted by the defendant to the IRS for tax year 1976 and received by the IRS in 1977. It is not entirely clear from the record whether defendant filed documents for years 1974 and 1975. In any case, the IRS determined for all three years that no return had been filed. [1]

Upon receipt of the 1976 protest document, the IRS Service Center referred defendant's form 1040 to the Criminal Investigation Division. A special agent in this Division, Charles Huckabee, was assigned to investigate. He contacted Stuart on December 1, 1977, and at this time informed him of his rights. A decision to pursue a criminal investigation was made on or about this date. Shortly thereafter, on December 14, 1977, a revenue agent responsible for determining civil aspects of defendant's tax liability was also assigned to the case.

On December 29, 1977, agent Huckabee issued summonses pursuant to 26 U.S.C. §7602 to obtain Stuart's financial records from the Bank of Cave City, the Bank of

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[1]The filing of a document containing insufficient information for calculation of a taxpayer's liability is in most circumstances tantamount to filing no return at all. *United States v. Barney*, 674 F.2d 729, 731 (8th Cir. 1982); *United States v. Miller*, 634 F.2d 1134, 1135 (8th Cir. 1980), *cert. denied*, 451 U.S. 942 (1981); *United States v. Brown*, 600 F.2d 248, 251 (10th Cir.), *cert. denied*, 444 U.S. 917 (1979).

Imboden and the Lawrence County Bank. These records were eventually obtained over defendant's objections.

On May 1, 1979, a new revenue agent was assigned to work with special agent Huckabee because the new agent's location was more convenient. The new agent, Mike Pitts, submitted a Revenue Agent Report on May 14, 1979. The report, which indicated that defendant owes certain taxes, penalties and interest, was reviewed and approved by an IRS Examination Review Staff on June 19, 1979. The IRS has held in abeyance any final action on the report. According to the testimony of agent Huckabee, it is IRS policy to take no final civil action in a case until all criminal features of the case have been resolved.

On June 22, 1979, special agent Huckabee mailed to the IRS district counsel a Special Agent's Report recommending prosecution. A copy of the Revenue Agent's Report was included as an exhibit to Huckabee's report. District Counsel for the IRS referred the case to the Department of Justice with a recommendation for prosecution on December 19, 1979.

An information in three counts alleging failure to file tax returns issued on June 22, 1981. Trial was had on October 21, 1981, with the result that Stuart was found guilty on all counts by the jury.

A. *Admission of Evidence Obtained Through Summonses.*

Defendant first alleges that the district court erred in admitting into evidence certain documents obtained through the use of IRS summonses. He contends that the summons process was not utilized for one of the valid civil purposes enumerated in 26 U.S.C. §7602, but for the purpose of aiding a criminal investigation.

This is not Stuart's first challenge to the IRS summonses. On March 10, 1978, agent Huckabee filed

petitions to enforce the summonses, and Stuart intervened to oppose judicial enforcement. He argued that the summonses had issued improperly without a showing of tax liability, and that they violated his fifth and fourth amendment rights. On appeal from the district court's order of enforcement we concluded that there was no merit in these arguments. *United States v. Stuart*, 587 F.2d 929 (8th Cir. 1978).

Stuart now attempts to attack the summonses on the different ground that they were not issued in good faith prior to an institutional decision to prosecute, as required by *United States v. LaSalle National Bank*, 437 U.S. 298 (1978). We decline to reach defendant's present challenge on the merits. The argument he raises could have been raised, and should have been, in the prior proceeding. *Robbins v. District Court*, 592 F.2d 1015, 1017-18 (8th Cir.), *cert. denied*, 444 U.S. 852 (1979). The principle of res judicata bars relitigation of the same claim even where a new theory is advanced as a basis for relief in the second suit. *Roach v. Teamsters Local Union No. 688*, 595 F.2d 446, 448 (8th Cir. 1979). This is a classic case of a litigant impermissibly attempting to relitigate the same claim under a different theory of recovery, in violation of well established principles of res judicata, or more precisely, claim preclusion. *Id.*

B. *Personal Jurisdiction.*

Stuart next contends he was not properly before the district court due to defects in his arrest warrant. The information in this case was filed on June 22, 1981, and as is customary, a summons was issued. Defendant informed the United States Attorney, however, that he wanted to be arrested. In compliance with his request, Agent Huckabee prepared an affidavit and requested an arrest warrant.

Defendant's objections to his arrest are not entirely clear. Giving him the benefit of all possible arguments, we

construe his objections to be (1) that the arrest warrant should have been supported by an affidavit of the United States Attorney, since the United States Attorney was the person who accused him of a criminal offense; and (2) the affidavit of Huckabee should have been signed before a magistrate, not a notary public. In light of these alleged defects in the documents underlying the arrest warrant, defendant apparently argues that the arrest was without probable cause. Under the posture of the case, we find these claims frivolous.

Although we find no constitutional or other infirmity in the Huckabee affidavit or in the process which brought defendant before the district court, we need not discuss these claims. It is well established that irregularities in the manner in which a defendant is brought into custody does not deprive the court of personal jurisdiction over the defendant in a criminal case. *United States v. Peltier*, 585 F.2d 314, 335 (8th Cir. 1978); *United States v. Turner*, 442 F.2d 1146, 1148 (8th Cir. 1971); *Collins v. Swenson*, 443 F.2d 329, 331 (8th Cir. 1971). *See also Frisbie v. Collins*, 342 U.S. 519, 522 (1952), *reh'g denied*, 343 U.S. 937 (1952); *Ker v. Illinois*, 119 U.S. 436, 440 (1886). No claim is asserted that any evidence was inadmissible due to the alleged unauthorized arrest. Thus, there is no relevant merit to defendant's claim.

C. *Speedy Trial Rights.*

The defendant's remaining contentions merit little discussion. Although his trial 112 days after his first appearance before a judicial officer appears to have violated the Speedy Trial Act of 1974, 18 U.S.C. §3161 (c) (1), the appearance of a violation is answered by periods of

"excludable time." *See* 18 U.S.C. §§3161 (h) (1) (F) and 3161 (h) (8) (A). [2]

Defendant argues that pretrial motions do not give rise to excludable periods under section 3161 (h) (1) (F) unless delay of the trial is actually caused by filing of the motions. We have previously considered and rejected this argument in view of the legislative history of the Speedy Trial Act and 1979 amendments thereto. *See United States v. Brim*, 630 F.2d 1307, 1312-13 (8th Cir. 1980), *cert. denied*, 452 U.S. 966 (1981).

D. *Selective Prosecution; Multiple Offenses.*

Stuart next alleges that the district court erred in denying an evidentiary hearing on his allegation of selective prosecution. Defendant, however, was given an opportunity to amend his motion to dismiss to allege such facts as would establish a prima facie case of selective prosecution. When he did not do so, the district court properly dismissed the motion as setting forth only conclusory statements. *United States v. Larson*, 612 F.2d 1301, 1304-05 (8th Cir.), *cert. denied*, 446 U.S. 936 (1980); *United States v. Brown*, 591

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[2] In counting days elapsed before trial, we exclude the 16 day period from July 14, 1981, to July 30, 1981. 18 U.S.C. §3161 (h) (8) (A). The record on appeal shows that the continuance granted during this time was to allow defendant to obtain counsel. We do not exclude July 1, 1981, to July 14, 1981, which involved time prior to the day first set for plea and arraignment. Defendant had not requested a continuance during this time.

We also exclude 51 days from August 18, 1981, when defendant filed certain pretrial motions, to October 8, 1981, when the district court ruled adversely on them. Delay resulting from a pretrial motion is properly excludable under 18 U.S.C. §3161 (h) (1) (F).

Adding together the exclusion of 16 and 51 days for a total of 67 excludable days, defendant's trial occurred 45 days after his first appearance before a judicial officer. This satisfies the Speedy Trial Act requirement of trial within 70 days. 18 U.S.C. §3161 (c) (1).

F.2d 307, 311-12 (5th Cir.), *cert. denied*, 442 U.S. 913 (1979).

Defendant finally alleges that if he was guilty of anything, he was guilty of one continuing offense rather than three separate offenses. We reject that contention since he owed a separate duty to file tax returns with respect to each of three years. Each breach of that duty involved a separate offense. *United States v. Paulton*, 540 F.2d 886, 893 (8th Cir. 1976); *United States v. Keig*, 334 F.2d 823, 827 (7th Cir. 1964); *overruled on different grounds*, *United States v. Cleveland*, 477 F.2d 310 (7th Cir. 1973).

The judgment and conviction of the district court is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
VS.	)	No. LR-CR-81-47
	)	
ALAN K. STUART	)	

ORAL OPINION OF DISTRICT COURT

THE COURT: As a matter of factual finding in connection with this particular issue, that being the timetable for the issuing of the summonses and the purpose of the issuance of the summonses, I find an investigation was begun by the IRS on December 1, 1977. A revenue agent whose function is to determine the civil liability of a taxpayer was assigned to the case on December 14, 1977; that the initial investigation proceeded as a civil investigation to determine the taxes due and the penalty due by the taxpayer; that on December 29, 1977, summonses were issued for the relevant bank records which were introduced into

the records during the course of the trial. Mr. Stuart took an appeal from the enforcement order issued in connection with those summonses, and that appeal delayed the enforcement of the summonses for a considerable period of time; that the Service finally secured the records from the Bank of Imboden in December of 1978, the Lawrence County Bank in December of 1979. These records were submitted to a revenue agent, Mr. Mike Pitts of Little Rock.

From that, a determination was made as to civil liability and penalty due from the taxpayer. A civil Revenue Agent Report was filed and subsequent to that time in July of 1980, and the precise date escapes me, a recommendation was completed by Mr. Huckabee who was in charge of the original civil investigation, that the matter be referred to the criminal department for investigation; that sometime in December of 1980, the matter was referred by the criminal division of the IRS to the Department of Justice for prosecution.

The bottom line to this is, I think—As I recall, the issue which is raised in connection with the objection to these records is that the summonses were issued solely for the purpose of securing information to proceed with the criminal prosecution.

I conclude, as a matter of fact finding and also as a conclusion of law, in terms of that particular section—And off the top of my head I don't recall that particular section number. Is it 702?

MR. O'BRYAN: 7602.

THE COURT: 7602, excuse me.—that the purpose of obtaining these summonses for the bank records was not solely for the purpose of the criminal prosecution. As a matter of fact, at the initial stages it was solely for determining civil liability and penalty.

Therefore, I think the bank records and information derived from the bank records is admissible, and that is the same ruling I made during the course of the trial. Rendered, November 24, 1982.

Not reported.

UNITED STATES of America and Charles D. Huckabee, Revenue Officer, Internal Revenue Service, Appellees,

v.

Alan K. STUART and Kathryn Stuart, Appellants.

No. 78-1551.

United States Court of Appeals, Eighth Circuit.

Submitted Nov. 28, 1978.

Decided Dec. 5, 1978.

PER CURIAM.

Alan K. and Kathryn Stuart (taxpayers) appeal from the district court's [1] order directing various bank officials to comply with Internal Revenue Service (IRS) summonses for bank records pertaining to taxpayers' financial affairs. We affirm.

On March 10, 1978 IRS Special Agent Charles D. Huckabee filed the instant petitions to enforce IRS summonses against officials of three Arkansas banks. The

[1] The Honorable Elsijane T. Roy, United States District Judge for the Eastern District of Arkansas.

summonses sought records relating to taxpayers' tax liability for the years 1973—1976. Taxpayers sought, and were granted, leave to intervene. By orders dated April 6, 1978 the court enforced the summonses. Taxpayers timely appealed and contend that the court erred in enforcing the summonses.

[1] First, taxpayers contend that the summonses were improperly issued because there is no showing that the IRS knew of any tax liability incurred by taxpayers. There is, however, no requirement that there be any knowledge of a tax liability or probable cause to believe one exists before a summons may issue. *See, e.g., United States v. Bisceglia*, 420 U.S. 141, 146, 95 S.Ct. 915, 43 L.Ed.2d 88 (1975); *United States v. Powell*, 379 U.S. 48, 51, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964).

[2-4] Second, taxpayers argue that compelling production of the bank records violates their fifth amendment right to be free from compulsory self-incrimination. They rely on *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886). In *Boyd*, the Court said that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" violated the fourth and fifth amendments. *Id.* at 630, 6 S.Ct. 524. Even assuming the continued validity of *Boyd*,[2] the Supreme Court has made it clear that *Boyd* does not apply unless the summoned records are, at least, possessed by the party challenging the subpoena. *See Couch v. United States*, 409 U.S. 322, 330-31, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973). Here, taxpayers did not possess the records in question.

Recent cases had made it clear that an IRS summons directed to a third-party bank does not violate the fourth amendment rights of a depositor under investigation. *See*

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[2] *But see United States v. Miller*, 425 U.S. 435, 440 n. 1, 96 S.Ct. 1622, 48 L.Ed.2d 71 (1976); *Fisher v. United States*, 425 U.S. 391, 407-09, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976).

United States v. Miller, 425 U.S. 435, 443-44, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). In addition, such a summons does not violate any fifth amendment right of a taxpayer, because it compels no testimony from him. *See Couch v. United States*, *supra*, 409, U.S. at 328-29, 336, 93 S.Ct. 611. *Cf. Fisher v. United States*, 425 U.S. 391, 409, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976) (subpoena served on taxpayer requiring production of accountant's workpapers; no fifth amendment violation). [3]

[5] Judicial enforcement of an IRS summons is proper only if the summons is issued in good faith, before the IRS has abandoned in an institutional sense civil tax determination or collection purposes, and prior to any recommendation by the IRS to the Department of Justice for criminal prosecution. *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 318, 98 S.Ct. 2357, 2368, 57 L.Ed.2d 221 (1978); *United States v. Schutterle*, 586 F.2d 1201, 1203 (8th Cir. 1978). Taxpayers do not allege that these prerequisites were not met here.

Accordingly, the order of the district court is affirmed.

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[3] Taxpayers make the bald assertion that there exists a privileged fiduciary relationship between them and the banks. There is nothing in the record to indicate any such relationship.

Taxpayers further contend that they have a "proprietary interest" in the banks' records. It is clear, however, that such records belong to the banks, not the depositors. *See United States v. Miller*, *supra*, 425 U.S. at 440-43, 96 S.Ct. at 1622-1624.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
VS.	)	No. LR-CR-81-47
	)	
ALAN K. STUART	)	
	)	

JUDGMENT AND COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on the 24th day of November, 1981, with Counsel, Joseph O'Bryan. There being a verdict of Guilty, defendant had been convicted as charged of the offenses of willful failure to file income tax returns for the calendar years 1974, 1975 and 1976 in violation of 26 USC 7203 as charged in the Information.

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and assessed a fine of $5,000.00 to stand committed on Count 1. On Count 2, imposition of sentence is suspended and the defendant placed on probation with supervision for a period of one (1) year to run consecutive to the period of incarceration to be served in Count 1. On Count 3, the defendant is remanded to the custody of the Attorney General or his authorized representative for incarceration for a period of one (1) year, provided, execution of the sentence shall be suspended and the defendant placed on probation with supervision for a period

of one (1) year to run consecutive with the probationary period imposed in Count 2 and consecutive to the period of imprisonment imposed in Count 1. Entered November 24, 1981.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2348	) September Term 1982
	)
	)
United States of America,	)
	)
Appellee,	)
	) Appeal from the
	) United States District
vs.	) Court for the Eastern
	) District of Arkansas
Alan K. Stuart,	)
	)
Appellant.	)

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

October 15, 1982

Office-Supreme Court, U.S.
FILED
FEB 10 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-998

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALAN K. STUART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-998

ALAN K. STUART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for willfully failing to file income tax returns, asserting that evidence obtained through an improper use of Internal Revenue Service (IRS) summonses was erroneously admitted into evidence during trial and that the court of appeals erred in concluding that he could not challenge the evidence because he had contested the summonses in earlier proceedings.

1. Following a jury trial in the United Stated District Court for the Eastern District of Arkansas, petitioner was convicted on three counts of willfully failing to file income tax returns, in violation of 26 U.S.C. 7203 (Pet. App. A-1). On the first count petitioner was fined $5,000 and was sentenced to one year's imprisonment; on the second and third counts the court suspended sentence, but imposed consecutive one-year terms of probation (Pet. App. A-1). The court of appeals affirmed (Pet. App. A-7).

2. Following receipt from petitioner of a protest document in the form of a 1976 tax return an IRS special agent initiated a joint investigation of petitioner on December 1, 1977 (Tr. 3, 5-A).[1] An IRS revenue agent was assigned to this investigation on December 14, 1977 (Tr. 4). On December 29, 1977, the special agent issued the two summonses at issue for third-party bank records pertaining to petitioner (*ibid.*). On March 10, 1978, the government filed petitions to enforce the summonses, and petitioner intervened to oppose enforcement. Petitioner argued that the summonses had been issued improperly because there was no showing of tax liability and that enforcement would violate his rights under the Fourth and Fifth Amendments (Pet. App. A-3 to A-4). The district court rejected his arguments and, on petitioner's appeal of the enforcement order, the court of appeals affirmed. *United States* v. *Stuart*, 587 F.2d 929 (8th Cir. 1978).

On December 19, 1980, the IRS sent a recommendation for criminal prosecution to the Department of Justice (Tr. 5-A). Subsequently, petitioner was charged with violations of 26 U.S.C. 7203 and he moved to suppress all evidence obtained through use of the summonses. The district court denied the motion (Pet. App. A-7 to A-9) and the court of appeals affirmed (Pet. App. A-3 to A-4).

3. The court of appeals correctly held (Pet. App. A-3 to A-4) that the principle of res judicata precluded consideration of petitioner's claim that the summonses were not issued in good faith since petitioner could have raised this claim in the prior summons enforcement proceeding. See *United States* v. *Bryan*, 339 U.S. 323, 332-335 (1950); *United States* v. *Fleischman*, 339 U.S. 349, 352 (1950);

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[1] "Tr." refers to the transcript of posttrial proceedings regarding the summons issue, held on November 24, 1981.

Maggio v. *Zeitz*, 333 U.S. 56, 68-69 (1948); *United States* v. *First National State Bank*, 616 F.2d 668, 675 (3d Cir. 1980); *United States* v. *Peter*, 479 F.2d 147, 149-150 (6th Cir. 1973); *United States* v. *Secor*, 476 F.2d 766, 769-771 (2d Cir. 1973).

Petitioner's arguments that res judicata should not apply here are without merit. Contrary to his assertion (Pet. 12) that it was impossible for him to discover in the enforcement proceedings the purpose of the summonses (and that he was able to do so only after the liberal discovery permitted in criminal proceedings), it is clear that petitioner had access to the relevant evidence at the enforcement stage. Indeed, in his brief before the court of appeals in this case (at 9-13), petitioner's argument was based solely on facts established by the testimony of the special agent, a witness available to petitioner at the enforcement hearing. Thus, petitioner had ample opportunity in the earlier proceeding to develop all relevant facts regarding the issue of good faith, and he cannot now complain that the principles of res judicata are not fairly applied here. *United States* v. *Bryan, supra; United States* v. *Fleischman, supra; Maggio* v. *Zeitz, supra; United States* v. *First National State Bank, supra.*

Similarly lacking in merit is petitioner's argument (Pet. 12-13) that the doctrine of res judicata should not have been applied because the "[i]ssues before the court in a criminal proceeding are entirely different from the issues which are before the court in a civil proceeding" and the burden of proof differs in civil and criminal proceedings. Whether the question of improper use of a summons arises in enforcement proceedings or in a criminal case, the issue is the same. Although the standard of proof on the ultimate issue of guilt in a criminal case differs from the standard of proof on the ultimate issue in a civil case, there is no difference in the

standard of proof when the question is whether enforcement should be denied because a summons has been used improperly or whether evidence should be suppressed for the same reason.[2] Indeed, "[t]he only difference lies in the remedy — whether or not to enforce the summons, as opposed to whether or not to reverse a conviction [based on improperly admitted evidence]". *United States* v. *Garden State National Bank*, 607 F.2d 61, 69 n.11 (3d Cir. 1979).[3]

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[2]The summonses here called for bank records relating to petitioner's accounts. We do not concede that a defendant in a criminal case has standing to attack a summons issued to a third party in order to have evidence obtained therefrom suppressed. Compare *United States* v. *Sand*, 541 F.2d 1370 (9th Cir. 1976), cert. denied, 429 U.S. 1103 (1977) (defendant lacks standing to suppress) with *United States* v. *Genser*, 582 F.2d 292, 305 (3d Cir. 1978), after remand, 595 F.2d 146, after remand, 602 F.2d 69, cert. denied, 444 U.S. 928 (1979). See generally *United States* v. *Miller*, 425 U.S. 435 (1976). At all events, there is no need to resolve this question since it is clear that petitioner's claim was properly rejected by the court of appeals for other reasons.

[3]Petitioner cites *Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938) and *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548 (1943), in support of his argument here (Pet. 12). But in *Mitchell* this Court held only that an acquittal in a criminal case for willful evasion of taxes, where the standard of proof was "guilty beyond a reasonable doubt", could not be used collaterally by the taxpayer-defendant to bar assessment and collection of the so-called fraud penalty in a subsequent civil tax action, where the government's standard of proof is lower. 303 U.S. at 397. Here, as noted, the respective burdens of proof do not vary. In *Marcus* this court held that "civil" recoveries in excess of actual damages subsequent to criminal conviction and punishment did not offend the Double Jeopardy Clause (317 U.S. at 548-550); the holding there did not address any res judicata issue.

Petitioner also asserts (Pet. 12-13) that the doctrine of res judicata should not have been applied here because it has been held that search and seizure questions arising under the Fourth Amendment can be litigated in a civil action for damages and then may be relitigated in a criminal proceeding if the evidence obtained through the search and seizure is offered as evidence against the accused. But the only authority cited by the treatise upon which petitioner relies is a state case (*Brenon* v. *State*, 31 A.D.2d 776, 297 N.Y.S.2d 88 (1969)) that is inconsistent

4. Even if the judgment in the earlier proceeding were not res judicata here, petitioner has not shown that the summonses were issued in bad faith under this Court's decision in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978).

These summonses were issued only 28 days after the joint investigation commenced (Tr. 3, 5-A) and subsequent to the assignment of a revenue agent to the case (Tr. 4). Their issuance preceded the IRS's recommendation of criminal prosecution to the Department of Justice by almost two years (Tr. 5-A). In *LaSalle*, this Court clearly stated that the test in determining whether a summons was issued in bad faith is whether the IRS had abandoned, in an institutional sense, its civil determination of taxes due and their collection in the particular investigation at hand. 437 U.S. at 316, 318. The Court added that the burden of showing that a summons was issued in bad faith is a "heavy one" where the challenged summons was issued prior to IRS's recommendation of criminal prosecution to the Justice Department. *Id.* at 316. Here, there is not a trace of the extraordinary circumstances to which *LaSalle* pointed as examples of bad faith,[4] and the primary case on which petitioner relies (Pet. 6-10). *United States* v. *Dahlstrum*, 493 F. Supp. 966 (C.D.

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with the result in *United States* v. *Garden State National Bank*, *supra*. Moreover, the cases upon which *Brenon* relies all hold that a judgment in a criminal case is not admissible in a subsequent civil proceeding involving different parties, a point we do not dispute.

[4] *E.g.*, IRS delay in submitting a recommendation, following an institution commitment to make the referral, simply to gather additional evidence for the prosecution; the gathering of information by the IRS for other agencies, regardless of the status of criminal cases. 437 U.S. at 316-317.

Cal. 1980), is a district court case, which the Ninth Circuit, in dismissing the appeal, specifically refused to "approve" as to the summons issue. *United States* v. *Dahlstrum*, 655 F.2d 971, 973 n.2 (1981), cert. denied, 455 U.S. 928 (1982).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1983

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[5]Petitioner seems to suggest (Pet. 9-10) that there is a conflict between *United States* v. *Genser*, 595 F.2d 146 (3d Cir.), cert. denied, 444 U.S. 928 (1979), and *United States* v. *Schutterle*, 586 F.2d 1201 (8th Cir. 1978). However, petitioner wisely does not argue that the decision of the court of appeals here was in conflict with the ruling of any other circuit; the court simply did not address the merits of the summons enforcement, having determined that consideration of the issue was barred by the doctrine of res judicata.

Petitioner also asserts (Pet. 6-10) that there is a conflict in the federal courts in the manner in which they treat a claim that a summons is being improperly utilized for the sole purpose of uncovering evidence of criminal violations. We do not agree that there is any conflict. But even if there were, review by this Court would not be warranted because Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.) has recently been amended by the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, Section 333, 96 Stat. 622-623, to permit the IRS to use a summons solely for the purpose of inquiring into criminal violations.